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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1029

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA,

Petitioner,

against

R & M KAUFMANN, a Division of Russ Togs, Inc., etc., *et al.*,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, R & M KAUFMANN, a Division of Russ Togs, Inc., TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

Contrary to the Petition, the only order (not "opinion") properly before this Court for review is that denying Petitioner's post-judgment motion for leave to intervene and for leave to file a petition in the Court below for a rehearing. That order is reproduced in Appendix to Petition for Writ of Certiorari, at p. 8a.

Although the opinion below on the merits is not properly before this Court, it is set forth in the Petition, *id.* at pp. 1a-7a.

Jurisdiction

Petitioner's statement as to jurisdiction, Petition, p. 2, is incorrect.

Respondent first disputes that this Court has jurisdiction to review the October 27, 1972 order denying intervention because, for reasons of waiver and timeliness, petitioner is not a "party" under 28 U.S.C. 1254(1).

Respondent secondly argues *infra* that in any case this Court has no jurisdiction to review the September 21, 1972 judgment on the merits.

Counter-Statement of the Only Question Presented

When a union participates actively as a party in proceedings before the National Labor Relations Board, is thereafter provided with full, formal and timely notice of the Court of Appeals enforcement/review proceeding, and the briefs of the parties are made available to it, may the Union *after judgment* be granted intervention for the purpose of re-litigating the merits, despite its deliberate decision to waive its right to intervene before judgment in the review proceeding?

Statutes Involved

The statutes involved are set forth in the Petition, except that an additional pertinent statute of the United States is:

> 28 U.S.C. 2101(c). Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.
> • • •

Counter-Statement of the Case

Petitioner was the petitioner in a protracted representation proceeding and was the charging party in an unfair labor practice refusal to bargain proceeding before the National Labor Relations Board, which resulted in the order to bargain reviewed by the Seventh Circuit.

Petitioner was given full, formal and timely notice of the Seventh Circuit enforcement/review proceeding.*

Approximately nine months elapsed between commencement of the enforcement/review proceeding and the date of argument. More than five months elapsed between argument below and the unanimous *per curiam* opinion and judgment granting the petition for review and denying enforcement. Petitioner knew that it had the right to intervene in that proceeding, but admits it decided not to seek timely intervention. Petition, p. 8; Appendix to Petition, p. 22a.

It was not until after the Court of Appeals denied enforcement of the Board's order and granted review, and even after the Board's time to seek a re-hearing had expired,** that petitioner, for the first time, moved for leave to intervene below and for rehearing of the merits.

After its motion was denied, the present Petition was filed. The Union has the temerity therein to seek review not merely of the denial of its motion to intervene, but also of the merits of the underlying opinion and judgment, even though petitioner was not, and still is not, a party to the enforcement/review proceeding.

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* See Appendix to Brief, *infra*.

** See Appendix to Petition at pp. 47a-48a.

Why the Writ Should Not Be Granted

I

No question warranting review by this Court is presented by the denial of intervention, after judgment, in an NLRB Court of Appeals enforcement/review proceeding, to a labor organization which deliberately refrained from exercising its undisputed right to intervene until after the extensive review proceeding had been concluded.

It is not only fundamental fairness to permit an interested person timely to intervene in a proceeding affecting his rights, but such intervention serves the additional purpose of judicial economy by permitting the rights, views and interests of all those directly affected by the controversy to be resolved in one litigation instead of in a multiplicity of successive litigations. To this end, this Court decided *International Union, Local 283* v. *Scofield; UAW* v. *Fafnir Bearing Co.*, 382 U.S. 205 [*Scofield/Fafnir*], which held that a timely motion to intervene by a successful charging party in an NLRB case would be granted—but only in the court in which the review proceeding is pending. 382 U.S. at 207, 208.

Petitioner's approach turns this salutary doctrine on its head. The critical rationale of *Scofield/Fafnir* is that timely intervention is guaranteed in NLRB cases precisely to avoid multiple Court of Appeals proceedings. 382 U.S. at 212-213. If petitioner's argument were accepted, an interested person or party to a Board proceeding would be permitted to watch as a spectator during the process

of litigation which affects his interests, and in which he is entitled by right to intervene, and, only if disappointed by the outcome, then to step forward as a "new" participant to demand litigation of the issues once again.

Such a view of intervention has no support among the circuits or in any of the decisions of this Court. Petitioner has raised no controversy which must be resolved among the circuits. Petitioner's contention, on its face, presents no substantial question of federal law which merits the attention of this Court.*

Indeed, contrary to petitioner's invocation of *Fafnir*, the only relevant authority concerning post-judgment attempts to intervene supports respondent. Thus, in *Cushman Motor Delivery Co., etc., et al.* v. *Hon. F. Ryan Duffy, et al.*, October Term, 1963, No. 1023 Misc., this Court refused to review denial of a post-judgment motion after an NLRB review proceeding where the employer among other things sought intervention. 376 U.S. 948. The Board in *Cushman* opposed review by the Supreme Court in large part because the motion for leave to intervene was made in the Court of Appeals after judgment. Brief and Petition in *Cushman, supra*, No. 1023 Misc.**

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* Furthermore, even if petitioner's motion to intervene otherwise had colorable substance, the issue is not clearly presented by this case because petitioner's post-judgment motion for leave to intervene fourteen months after commencement of the review proceeding was untimely under the Federal Rule of Appellate Procedure 15(d) thirty-day requirement. See especially Appendix to Petition at pp. 46a-50a.

** *Cushman* sought review of the judgment in *Flack* v. *NLRB*, 327 F.2d 396 (7th Cir.). The employer and union there, unlike the instant case, were given only informal notice of the Court of Appeals proceeding. Significantly, the employer commenced a new, mandamus proceeding in this Court and argued in *Cushman* that the extraordinary writ was the only available remedy to it because it admitted that it had no statutory certiorari right under 28 U.S.C. 1254(1) since it sought review of the very denial of its application to become a party.

Petitioner is simply wrong when it claims it is being denied its right to intervene. The Court below did not deny the right. Petitioner waived the right.

II

Even if petitioner is assumed *arguendo* to be a "party" for the purpose of seeking review of the order denying intervention,* manifestly it has no standing and is not a "party" and therefore this Court has no jurisdiction with respect to review of the judgment on the merits. 28 U.S.C. 1254(1).

It is settled that "[t]he refusal of the court below to permit one to intervene as a party does not, however, entitle that person to review by the Supreme Court, either by certiorari or appeal, of anything but the denial of the motion to intervene." Stern & Gressman, "Supreme Court Practice" (4th Ed., 1969), p. 282, citing *Scofield/Fafnir*, 382 U.S. at 209; and *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683; *Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519; *Cascade Natural Gas Corp.* v. *El Paso Gas Co.*, 386 U.S. 129.

Finally, the present Petition is filed far too late for review of the original September 21, 1972 judgment in any event. 28 U.S.C. 2101(c). Therefore, to grant the instant Petition would be futile: it would provide review of a judgment which has become non-reviewable.

* The ninety-one-day lapse between the October 27, 1972 "intervention" order and the January 26, 1973 filing of the instant Petition raises the question whether the entire Petition is untimely, in violation of 28 U.S.C. 2101(c).

III

To the extent the Petition seeks to attack the merits of the original judgment denying enforcement and granting the petition for review, two observations are apposite:

(A) Petitioner has no standing because it still is not a party to the proceeding below, and consequently may not petition for review on the merits. See argument, Point II.

(B) Even if petitioner had standing, review would not be justified. The judgment denying enforcement is based upon the Seventh Circuit's conclusion on its review of the record that the relationship between petitioner and NAWCAS, a disqualified association, is too close and too intertwined to meet the prophylactic requirement that District 65 must bargain for the benefit of its employees and not for the protection of NAWCAS; that, in short, the present record establishes a conflict of interest. Appendix to Petition, at pp. 1a-7a.

This Court has ofen held that it will not review the conclusions reached by the Court of Appeals upon the latter's review of the record in an unfair labor practice case merely on the chance that this Court may reach a different conclusion. *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, at 502; *NLRB* v. *American National Insurance Co.*, 343 U.S. 395; *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404.

Conclusion

The petition for writ of certiorari should in all respects be denied.

Respectfully submitted,

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APPENDIX

Petition for Review

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

R & M KAUFMANN, a Division of RUSS TOGS, INC.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

R & M KAUFMANN, a Division of RUSS TOGS, INC., hereby petitions the Court for review of the Order of the NATIONAL LABOR RELATIONS BOARD which finds petitioner in violation of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act and orders it to bargain collectively with District 65, Wholesale, Retail, Office and Processing Union; said Order being entered on July 9, 1971.

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U.S.C.A.-7th Cir.
FILED
July 13, 1971
Kenneth J. Carrick,
Clerk

Affidavit of Service by Mail

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[SAME TITLE]

State of New York)
County of New York) ss.:

JEROME B. KAUFF, being duly sworn deposes and says that he is the attorney for petitioner, R & M KAUFMANN, a Division of RUSS TOGS, INC., herein. That on the 13th day of July, 1971, he *served a Petition for review upon District 65, Wholesale, Retail, Office and Processing Union, charging party** before the National Labor Relations Board by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 477 Madison Avenue, in the County and State of New York, directed to said charging party at 13 Astor Place, New York, New York, that being the address within the State designated by it for that purpose or place where it then kept an office, between which places there then was and now is a regular communication by mail.

a/ Jerome B. Kauff

JEROME B. KAUFF

[Sworn to before a notary public]

* Emphasis added.